104. Arnold & Porter acknowledged in the February 1990 Opposition that neither they nor the Stations had any statistics regarding the percentage of minorities with classical music training. Therefore, the law firm cited to the statistic regarding minority listeners as

> a measure that would overstate the availability, would be a measure of persons who listen to the only full-time classical music station in the city. I assumed that persons who have expertise or interest or knowledge about classical music would likely in many cases listen to the only full-time classical music station in the city.

(Tr. 1025 line 24 - 1026 line 4; see also Church Ex. 8, p. 7).

105. Reverend Devantier did not object to the argument about the need for "specialized skills" because it was prepared by the Stations' legal counsel "in whom [he] had some confidence to know about such things . . . ." (Tr. 834). When offense was apparently taken in 1992 to the argument about knowledge of classical music, Dennis Stortz faxed Ms. Cranberg a note making it clear to her that while the FM station's need for those with knowledge of classical music was real, he did not want it to be construed as an "excuse." Mr. Stortz stated in his fax note: "While all of this information about classical music knowledge and 'Lutheran' requirements is true and applicable, I don't want to make it sound like an excuse. It is what we do as radio stations, and there is no bent toward discrimination." (Church Ex. 4, p. 10-11 n.2; Church Ex. 4, Att. 8). Ms. Cranberg told Mr. Stortz that she still considered the argument to be "legitimate" even if it had apparently antagonized the NAACP or FCC staff. (Tr. 1023).

106. Ms. Cranberg testified that in drafting the February 1990 Opposition (and other pleadings), she used as synonyms the terms "knowledge of classical music," "classical music training," "expertise in classical music," and a "working knowledge of classical music." Specifically, all the terms meant that persons hired for the relevant positions had to have a "fairly significant knowledge of classical music." Ms. Cranberg testified that she certainly did not intend to mislead the Commission by using these different expressions to refer to the same idea. (Church Ex. 8, p. 6 n.2).

107. In drafting the Opposition, Ms. Cranberg implied that knowledge of classical music was a "requirement" for certain positions. (See, e.g., Church Ex. 4, Att. 7, p. 13; see also Tr. 1033 (Ms. Cranberg drafted the pleading)). Ms. Cranberg testified that she used this language on the basis of a number of conversations and written communications from Dennis Stortz. (Tr. 990-91, 1020-22). Ms. Cranberg had asked Mr. Stortz whether there were any particular positions at the Stations that required certain specialized skills or background. (Tr. 990-91, 1020-21). Ms. Cranberg's best recollection was that Mr. Stortz had stated that there were such requirements. (Tr. 990-91, 1021-22). Mr. Stortz also faxed her a two-page memorandum in which he wrote: "KFUO-FM's format is 'Classical', with many of it's [sic] positions requiring a knowledge of classical music and foreign language, with a hope that the sales people can relate and talk knowledgeably about the format. Those are not easy positions to

fill." (NAACP Ex. 49, p. 3).[37/] Based on these conversations, Ms. Cranberg determined to use the word "requirements," and it was she who had the idea to make the argument regarding the appropriate labor pool. (Tr. 1022-23).

108. Ms. Cranberg later learned that while the station sought salespeople with knowledge of classical music, it occasionally hired people without same. (Tr. 1028). The earlier statement that knowledge of classical music was a "requirement" was therefore probably an "overstatement" and Ms. Cranberg stated: "I wish that I had used another word." (Tr. 1027-28). When Ms. Cranberg focused on the fact that KFUO-FM had sometimes been unable to find applicants for sales positions with classical music knowledge, she acknowledged the point explicitly in pleadings, especially at page 12 of the December 28, 1992 Response to FCC Inquiry. (M.M. Bur. Ex. 14, p. 14 ("The Commission has requested additional information concerning the requirement that KFUO-FM salespeople be knowledgeable about classical music. KFUO-FM enforces this requirement by making every effort to hire such persons whenever it can; it only employs sales people who do not possess this expertise on those occasions when it is unable to secure suitable persons with the requisite classical music background.")). Ms. Cranberg testified that there was no intention whatsoever to mislead the Commission

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37/ This was the same point that Arnold & Porter had made to the Commission on WFLN's behalf. (Joint Ex. 2, Att. 1, p. 25); see supra ¶ 103). The Commission did not criticize this argument in denying an EEO challenge to WFLN's operations. (Joint Ex. 2, Att. 2).

by using the word "requirement" in earlier pleadings. (Church Ex. 8, p. 6 n.2). Moreover, Ms. Cranberg stated that she did not believe that the fact that the requirement was waivable made unsound the argument she had formulated concerning the appropriate labor force statistics. Ms. Cranberg stated:

> I think it's still a legitimate point to make. The, the very point is that it's difficult to find people with that background and that there is not a great availability of any race, and so the fact that the station hasn't been able to find people with, with this background in all cases I don't think undermines the point that was being made.

(Tr. 1028 lines 10-15).

C. MISREPRESENTATION/LACK OF CANDOR ISSUE

109. The FCC Form 396 Broadcast EEO Program which was included with the 1989 license renewal applications was prepared by Paula Zika, the Director of Business Affairs at the Stations. Ms. Zika has been employed at the Stations since January 1971 working in a variety of positions relating to station operations. Since the early to mid 1980's, Ms. Zika has served in the capacity of Director of Business Services, although the title of that position has changed several times over the years. From 1987-1991, her title was Director of Station Operations. With the exception of the Stations' Chief Engineer and the Assistant Engineer, Ms. Zika has worked at the Stations longer than any other employee. (Church Ex. 3, p. 1; see also Tr. 325-26).

110. Over the years, Ms. Zika's responsibilities have included handling administrative and business matters for the Stations including personnel matters. She also prepared FCC

forms for the Stations. When the 1989 license renewal packet arrived, Ms. Zika was given the responsibility of gathering the necessary information and typing the applications. During her time at the Stations, she had prepared FCC filings for a number of different General Managers and acting General Managers. (Church Ex. 3, p. 1). In preparing the FCC Form 396 Broadcast EEO Program Report to be included with the license renewal applications, Ms. Zika reviewed the EEO Program Report filed with the 1982 renewals and typed up the 1989 EEO information using the 1982 Report as the basis. (Church Ex. 3, p. 1; see also Tr. 327-29).

111. In responding to the questions on the Form 396, Ms. Zika went through the Stations' employment records, which she maintained as part of her duties, to provide the employment figures requested by the FCC. (Church Ex. 3, pp. 1-2). Ms. Zika compiled the data regarding the question in the Form 396 asking about "Job Hires." The question asked for the total hires during the twelve month period prior to filing the renewal application. Ms. Zika answered the question that she thought was being asked. Specifically, Ms. Zika thought that the question was asking only for full-time hires during the past 12 months that were still employed at the station at the time the renewal application was being prepared. Although Ms. Zika had worked on the 1982 FCC Form 396 which had a similar question, she had not made the calculations to answer the "Job Hires" question in the 1982 application. (Church Ex. 3, p. 2).

112. Based on her understanding of the question on "Job Hires" in the Form 396, Ms. Zika wrote in: "During the twelve month period beginning October 1, 1988 and ending September 30, 1989, we hired a total of six persons, two white males and four white females." She reached this figure by adding the full-time hires in the last twelve months who were still working at the Stations in September 1989. (Church Ex. 3, p. 2; see also Tr. 330).

113. The question on "Job Hires" in the FCC Form 396 asks for the following information:

> During the twelve-month period prior to filing this application beginning (Month-Day-Year) _____ and ending (Month-Day-Year), _____ we hired:
>
> Total hires _____ Minorities _____ Women _____

(Church Ex. 9, p. 4).

114. The form does not specify whether the response should include part-time as well as full-time employees nor whether the renewal applicant should count people hired who thereafter departed before the end of the period. (See Church Ex. 9). Ms. Zika testified that when she was asked to supply this information by Mr. Stortz, she "interpreted this to mean the number of people that were hired during that 12-month period and were still employed." (Tr. 341-42).

115. Dennis Stortz, the Director of Operations in September 1989, recalled reading through the Form 396 EEO Program Report during the preparation of the renewal applications, but he did not ask Ms. Zika about the information on "Job Hires." He was aware that she had reviewed the employment records which she kept

in completing the applications. After the renewal applications were completed, they were forwarded to Reverend Paul Devantier, the Executive Director of the Church's BCS, so that he could have them signed by the Reverend Dr. Ralph A. Bohlmann, who was then President of the Church. (Church Ex. 4, p. 19).

116. The KFUO(AM) and FM renewal applications were filed with the Commission on September 29, 1989. In December 1989, Dennis Stortz assisted the Church's communications attorney, Marcia Cranberg, in preparing a Supplement to the renewal applications that was filed on December 29, 1989. That Supplement, like the renewal applications, reflected that during the twelve month period beginning October 1, 1988 and ending September 30, 1989, the Stations hired a total of six persons, two white males and four white females. (Church Ex. 4, pp. 19-20).

117. On January 2, 1990, the NAACP filed its petition to deny the Church's license renewal applications. (See M.M. Bur. Ex. 3). On January 4, 1990, the EEO Branch of the FCC sent a letter to Reverend Paul Devantier asking for detailed information concerning full-time and part-time job hires at KFUO during the three year time period from October 1, 1986 to October 1, 1989. At the direction of Reverend Devantier, Paula Zika and Dennis Stortz gathered the information requested for that three year period. Ms. Zika and Mr. Stortz reviewed the Stations' records and collected the names, dates of hires and the full-time or part-time status of hires over the last three years. They sent the information to Marcia Cranberg at Arnold & Porter for

inclusion in the Opposition that was filed on February 23, 1990 as a response to the Petition to Deny and to the January 4, 1990 FCC letter. (Church Ex. 4, p. 20; see also Church Ex. 3, p. 2).

118. Included in the information submitted with the Opposition to Petition to Deny was a Table 3 which supplied the information requested by the FCC's January 4, 1990 letter for each position filled at the Stations during the three year period from October 1, 1986 to October 1, 1989. When Ms. Zika and Mr. Stortz compiled Table 3 for the 1990 Opposition, they did not notice any disparity between that information and the information contained in the EEO program that was appended to the license renewal application. (Church Ex. 4, p. 20; see also Church Ex. 3, p. 2). Likewise, there was no evidence that Ms. Cranberg noticed any discrepancy or brought it to the attention of the Church.

119. There was no further mention of the hire data until the FCC requested additional information in a letter dated June 26, 1992 from Glenn Wolfe to the Reverend Ralph A. Bohlmann. (See M.M. Bur. Ex. 8). For the first time in the almost two and one-half years since the filing of the Opposition, the FCC sought clarification as to why the original renewal applications listed six hires for the October 1, 1988 to September 30, 1989 time period while the February 1990 Opposition indicated that there had been fourteen hires (ten full-time and four part-time) during that time period. (Church Ex. 4, p. 21).

120. Upon reviewing this letter, Dennis Stortz examined the renewal application and the Opposition to try to figure out the

reasons for the apparent discrepancy. He sent the Stations' communications counsel, Marcia Cranberg, a letter stating that he did not understand the reason for the apparent discrepancy. (Church Ex. 4, p. 21; Church Ex. 4, Att. 17). Mr. Stortz asked Paula Zika how she had arrived at the number six in completing the renewal applications. Ms. Zika told Mr. Stortz that she believed the difference in the answers was probably the result of the two different questions asked by the FCC. In the license renewal applications, the FCC had requested the number of "total hires" which Ms. Zika interpreted to mean the "net gain" of full-time hires. She had not counted employees who were hired in 1989 but who had already left by mid-September 1989 when the renewal applications were completed since such employees had no impact on the Stations' minority or female employment profile as of the time the renewal applications were filed. Therefore, Paula Zika told Dennis Stortz that KFUO had a "net gain" of six persons during this period and the Stations had referred to this "net gain" as the total number of persons hired in the license renewal applications. (Church Ex. 3, p. 3; Church Ex. 4, p. 21). Ms. Zika wrote a note to Mr. Stortz at the time explaining that she had calculated a "net gain" of six persons for the renewal applications. (Church Ex. 3, p. 3; Church Ex. 3, Att. 1; Tr. 343-44).

121. In contrast, the January 4, 1990 letter from the Commission had asked for information for "each position filled" between October 1, 1986 and October 1, 1989 and its "full or part-time status." (M.M. Bur. Ex. 4). When Paula Zika and

Dennis Stortz gathered the information for the Table 3 included in the Opposition, they reviewed all payroll and personnel records for the time period for both full-time and part-time employees and listed every hire (as requested in the January 4 letter), as opposed to the total hires (as requested in the renewal applications). (Church Ex. 4, pp. 21-22).

122. On July 13, 1992, Dennis Stortz filed a letter with the FCC in response to the FCC's June 26, 1992 letter. (See M.M. Bur. Ex. 9). In his letter, he indicated that as he now understood the FCC to interpret the question in the renewal applications, the number six included under the "Job Hires" section was inaccurate and that section should have stated that there was "a Net Gain of six persons during this period" rather than six persons hired. KFUO's December 28, 1992 Reply to an FCC letter dated November 17, 1992 repeated Mr. Stortz's understanding that there had been a net gain of six employees during the time period beginning October 1, 1988 and ending September 30, 1989. (Church Ex. 4, p. 22; see M.M. Bur. Ex. 14).

123. After the Commission released its HDO on February 1, 1994 which included a misrepresentation/lack of candor issue concerning the question of the six hires set forth in the license renewal applications versus the fourteen hires listed in the Opposition, Paula Zika and Dennis Stortz once again examined station records to try to confirm exactly how the discrepancy referred to by the FCC had occurred. (Church Ex. 3, p. 3; Church Ex. 4, p. 22). The HDO noted that the number of hires reported in the 1989 license renewal application was six while the number

of hires reflected in Table 3 of KFUO's February 23, 1990 "Opposition to Petition to Deny and Response to Inquiry" was fourteen. Ms. Zika interpreted the question in the renewal applications to encompass only full-time hires and had not counted the four part-time employees who were listed in the Opposition.[38/] Most of the Stations' part-time employees were from Concordia Seminary. They typically worked only 6-12 hours per week and received no employee benefits. In effect, they were paid interns. Thus, Ms. Zika and Mr. Stortz testified that the discrepancy referred to by the FCC appeared to be six versus ten rather than six versus fourteen. (Church Ex. 3, pp. 3-4; Church Ex. 4, pp. 22-23).

124. Ms. Zika reached the number six set forth in the license renewal application because she did not count employees who were hired in 1989 but who had left the Stations before mid-September 1989 when she prepared the applications. There were two such employees. She also did not count a third employee, Reverend Schultz, who was hired to be the new AM General Manager on September 25, 1989 but who did not actually start work until after October 1, 1989. At the time Ms. Zika prepared the renewal applications in mid-September 1989, she had not been told

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38/ The FCC Form 396 does not specifically request information on part-time hires and appears to focus only on full-time hires. In this regard, the FCC Form 396 indicates that it only needs to be completed and filed with the Commission if the station employs five or more full-time employees. (Church Ex. 9, p. 1). Thus, a station could employ fifty part-time employees and never report any information as to its EEO program so long as it had four or fewer full-time employees. It is therefore not surprising that it was interpreted to cover only full-time hires.

that Reverend Schultz had been hired and therefore she did not count him among the hires for that time period. (Church Ex. 3, p. 4; Church Ex. 4, p. 24; Tr. 339). At the hearing, Ms. Zika stated:

> [T]he statement was correct insofar as I, I had understood the question. In, in checking, I realized that I had used only full-time hires and people that were still working at the station. I did not count part-time, and I did not count the hires that had come and gone in that particular period.

(Tr. 335 lines 9-14).

125. Based on her review of Station records after the HDO was released, Ms. Zika discovered that the only full-time employee who was hired between October 1, 1988 and September 30, 1989 that she inadvertently failed to list was Robert Thomson, a white male, who was hired as a salesworker on October 24, 1988. (Tr. 339). Since the Stations did not have employee records on computer during the license renewal period, and Ms. Zika had not remembered any hires in the last quarter of 1988 when she was preparing the license renewal applications, she did not check Mr. Thomson's hire date in his personnel record and inadvertently failed to count him. Thus, Ms. Zika explained that the net gain of full-time hires between October 1, 1988 and September 30, 1989 was actually seven rather than the six stated in the license renewal applications. Three of the hires were white males and four were white females. (Church Ex. 3, pp. 4-5).

126. When it came time in January and February 1990 to review the payroll records to answer the detailed questions about each hire requested in the Commission's January 4, 1990 letter,

the records indicated that Reverend Schultz was added to the payroll on September 25, 1989 and that was therefore the date used in Table 3 of the Opposition. When Paula Zika and Dennis Stortz reviewed the 1986, 1987, 1988 and 1989 payroll records to create Table 3, Bob Thomson was also included. (Church Ex. 4, pp. 23-24).

127. As Mr. Stortz explained, while the discrepancy between the renewal application and Table 3 of the Opposition was unfortunate in that it caused much confusion and expenditure of effort, it was the result of Paula Zika's good faith effort to answer the question that she believed the FCC had posed in the renewal applications. (Church Ex. 4, p. 25). Ms. Zika testified that she never intended to deceive the Commission in any way concerning the matter of job hires at the Stations. This lack of deceptive intent was corroborated by Ms. Cranberg in her testimony. (Church Ex. 8, p. 8). The discrepancy was simply the result of her confusion regarding the question posed in the Form 396, her failure to recall that Mr. Thomson had been hired during the relevant twelve month period and her lack of knowledge that Reverend Schultz was to be hired during the relevant period. (Church Ex. 3, p. 5). Similarly, while the explanation for the discrepancy turned out to be slightly more complicated than the simple "net gain" of employees that Mr. Stortz originally understood it to be, that misunderstanding resulted from confusion between Dennis Stortz and Paula Zika as to what was meant by "net gain." Because of the very complexity of the events that occurred, the precise nature of this misunderstanding

went undetected until the Stations re-examined the matter after designation. Although the information concerning "total hires" submitted to the FCC in the license renewal applications may not have been fully accurate, any inaccuracies were entirely unintentional and the result of a good faith misinterpretation by the Stations. There was no intent on the part of Dennis Stortz, Paula Zika or anyone else associated with the Church to deceive the FCC on these or any other matters. (Church Ex. 4, pp. 25-26; Church Ex. 3, p. 5).[39/]

III. Proposed Conclusions of Law

128. Based upon the foregoing findings of fact and the following legal analysis, the Church submits that it fully complied with the nondiscrimination provisions and substantially complied with the affirmative action provisions of Section 73.2080(a) and (b) of the Commission's Rules during the License Term, and that the Church did not make any misrepresentations of fact or lack candor in violation of Section 73.1015 of the Commission's Rules. Accordingly, the public interest, convenience and necessity would be served by a grant of the Church's applications for renewal of license of Stations KFUO(AM) and KFUO-FM for the full remaining renewal terms to expire February 1, 1997, subject, at most, to EEO reporting conditions.

39/ To the extent that the HDO suggests that the Church misrepresented/lacked candor concerning its recruitment efforts, its arrangement with Concordia Seminary and/or the requirement of classical music background, these areas have been addressed in the findings on the EEO affirmative action/nondiscrimination issue.

Furthermore, for these reasons, no Forfeiture Order should be issued.

A. EEO PROGRAM ISSUE

129. This is an extraordinarily delicate case. This is not, however, because the facts are complex or in dispute. For the most part, the facts as set forth by the Church in its direct case are undisputed. The difficulty is in finding a constitutionally permissible balance between the prohibition on entanglement of church and state, the free exercise of religion guaranteed by the First Amendment, and the Commission's EEO Rule and policies. The Church is not contesting the principle that "like any other group, a religious sect takes its franchise 'burdened by enforceable public obligations'." King's Garden, Inc. v. FCC, 498 F.2d 51, 60 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974) ("King's Garden") (quoting Office of Communication of United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966)). However, re-stating that principle only begs the question since King's Garden already stands for the proposition that the Constitution requires some degree of accommodation of a religious licensee's freedom of religion rights. What this case raises squarely for resolution is whether the degree of accommodation delineated by King's Garden is legally sufficient given the U.S. Supreme Court's decision in Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987). The Church submits that it is not. As a result, neither the Commission, nor its licensees who are

religious entities, may reasonably rely upon King's Garden to illuminate the proper boundaries of a religious licensee's obligations and rights under the FCC's EEO rule. Thus, it appears that this is a case of first impression.

1. In Order to Reject the Validity of KFUO's EEO Program, the Commission Would Have to Do So on Constitutionally Impermissible Grounds

130. The record clearly demonstrates the Church's recognition that all persons are created equal in the eyes of God and that membership in the Church is open to everyone. The Church is steadfast against discrimination and racism. The Church also fully embraces EEO regulations and policies that ensure nondiscrimination and affirmative action in employment practices to the extent they do not, as enacted or applied, violate the freedom of religion protections of the First Amendment of the United States Constitution.[40/] The Church's EEO policies and practices have met those requirements.

131. The starting point of the analysis is the case normally cited as controlling in conflicts between the Commission's EEO Rule and religious entities, King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974). In that case, a religious organization had been found by the Commission to have been discriminating on the basis of religion in making its hiring

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40/ U.S. Const. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

decisions. As a result, the Commission asked the station to submit a statement of its future hiring practices and policies and told the licensee that religious discrimination was only permissible for persons hired to "espouse a particular religious philosophy over the air." Id. at 52 n.1. The licensee appealed, arguing that the 1972 amendment to Title VII of the Civil Rights Act of 1964, codified at, 42 U.S.C. §2000e-1(a) (1981 and Supp. 1994) (the "Civil Rights Act"), which exempts all activities of religious entities from the Civil Rights Act's ban on religious discrimination in employment,[41/] was a statement of national policy by Congress and a necessary exemption in order to avoid a violation of the First Amendment's protection of religion. Thus, argued the licensee, it should be able to discriminate on the basis of religion when hiring any employee, not just those involved in the espousal of the licensee's religion. King's Garden, 498 F.2d at 57.

132. The court agreed with the licensee that the Commission's view of the types of employees that must be exempted from prohibitions on religious discrimination was too narrow, but refused to exempt all employees. Instead, the court determined

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41/ The 1972 amendment, § 702 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a) (1981 and Supp. 1994), provides:

> The subchapter shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

that it was permissible to exempt those employees having a "substantial connection with program content." Id. at 61. In refusing to exempt all employees of a religious entity, the court stated:

> The 1972 exemption is of very doubtful constitutionality, and Congress has given absolutely no indication that it wished to impose the exemption upon the FCC. Under these circumstances the Commission is fully justified in finding that the exemption does not control its "public interest" mandate under the Communications Act.

Id. at 53-54.

133. The court then proceeded to dedicate the largest portion of the decision to discussing the unconstitutionality of the 1972 amendment, writing that

> the 1972 exemption now shelters myriad "activities" which have not the slightest claim to protection under the Free Exercise, Free Speech, or Free Press guarantees. . . .
>
> In addition to being vulnerable on First Amendment grounds, the 1972 exemption appears unconstitutional on Fifth Amendment grounds as well.

Id. at 56-57. Given its view that the 1972 amendment to the Civil Rights Act was unconstitutional, the court refused to find that the amendment established a national policy by Congress to exempt religious institutions from restrictions on the consideration of religion in hiring decisions. Specifically, the court stated that

> it is very dangerous indeed to inflate a constitutionally doubtful statute into a "national policy" having force beyond the statute's literal command. The customary, and more prudent, course is to construe

> statutes so as to avoid, rather than aggravate, constitutional difficulties.

Id. at 57 (citation omitted).[42/]

134. In his contribution to the decision by way of a concurrence, Judge Bazelon wrote:

> I disagree with my colleagues that the FCC can impose employment requirements in direct conflict with the standards established by Congress in Title VII. The Commission's mandate to act in the "public interest" does not empower it to contravene an explicit Congressional policy. This is so, however, only if the policy in question is constitutional. I am convinced by the reasoning of part I of the court's opinion that Title VII's exemption of all "activities" of any "religious corporation, association, educational institution or society" violates the Establishment Clause of the First Amendment. Therefore, I would hold the exemption unconstitutional, and not binding on the FCC.

Id. at 61 (citation omitted).

135. Despite the court's conviction that the 1972 amendment was unconstitutional and therefore not binding on the Commission,

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42/ The court, in declining to find that the 1972 amendment was binding upon the FCC's EEO regulations, also cited the fact that the legislative history of the amendment did not specifically indicate that Congress intended the policy contained in the amendment to apply to the FCC. King's Garden, Inc. v. FCC, 498 F.2d 51, 57 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974). However, the FCC's EEO regulations were fairly new in 1972, and as demonstrated by the fact that the King's Garden case was decided at the Commission level after the 1972 amendment, see King's Garden, Inc., 38 F.C.C.2d 339 (1972), aff'd, 498 F.2d 51 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974), the FCC's regulations as they related to religious institutions had not yet been put into issue and it was therefore not surprising that they did not draw a separate commentary from Congress in the legislative history of the 1972 amendment.

the court noted the constitutional sensitivity of the matter, ruling that

> we uphold the Commission's regulatory scheme as facially sound, while recognizing that its future application will require continuing judicial scrutiny. . . .
>
> The challenge here is to the facial adequacy of the [FCC's] exemption. Application of the general exemption policy to a particular job position may raise additional problems, but they are not presently before us.

Id. at 54, 59.

136. Those constitutional infirmities are now directly before the Commission to a degree not even possible at the time of the King's Garden decision. First, the Commission's EEO requirements are far more specific and expansive now than they were in 1974 when that case was decided, thereby increasing the burden they place on religious entities as well as the intrusiveness of the government regulation. Second, unlike in King's Garden, the question here is not the facial adequacy of the Commission's EEO policies as they relate to religious institutions, but the implications of an intensive job by job examination of a church's hiring practices and decisions that is required by the unfettered application of the Commission's extensive EEO requirements to such an entity. Third, and most importantly, the U.S. Supreme Court has since shattered the premise of King's Garden v. FCC by ruling that the 1972 amendment exempting all employment positions of a religious entity from restrictions on religious preferences is constitutional. See Corporation of the Presiding Bishop of the Church of Jesus Christ

of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) ("Amos"). More to the point, the U.S. Supreme Court specifically acknowledged that Congress had been reasonable in finding that the very type of government examination into employment practices that has occurred in the KFUO proceeding impermissibly inserts the government into religious matters in violation of the First Amendment.

137. In the Amos case, the Mormon Church had fired a building engineer who worked at a gymnasium open to the public that was operated by the Mormon Church. The reason for his termination was that he had failed to maintain his eligibility to be a member of the Mormon Church and to attend its temples. The building engineer sued under Title VII of the Civil Rights Act, claiming religious discrimination. The Mormon Church moved to dismiss the case based on the 1972 amendment to the Civil Rights Act of 1964 exempting religious institutions from claims of religious discrimination. Id. at 330-31.

138. The building engineer argued in opposition that the 1972 amendment was unconstitutional because it provided favorable treatment for religious entities. The District Court, using an analysis very similar to that used in King's Garden, found that § 702 of the Civil Rights Act was unconstitutional as applied to nonreligious jobs, and that the position of building engineer was indeed a nonreligious position. The District Court therefore found for the building engineer on his complaint of religious discrimination. Id. at 333-34.

139. On direct appeal to the U.S. Supreme Court, the Court held that § 702 was constitutional, and reversed the District Court, stating:

> It cannot be seriously contended that § 702 impermissibly entangles church and state; the statute effectuates a more complete separation of the two and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in in this case.

Id. at 339. Particularly relevant to this case is the Court's statement that

> it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Id. at 336 (footnote omitted).

140. In his concurrence, in which Justice Marshall joined, Justice Brennan wrote that while he thought that § 702 might have the effect of furthering religion to the extent it applied to non-religious jobs, it was nonetheless constitutionally justifiable as a way of preventing government intrusion upon the affairs of a religious entity:

> What makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs. Furthermore, this prospect of government intrusion raises concern that a religious organization may be

> chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community's process of self-definition would be shaped in part by the prospects of litigation. A case-by-case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity.

Id. at 343-44 (citation omitted).[43/]

141. The Court's decision in Amos, and Justice Brennan's concurrence in particular, are indeed prescient. In this

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43/ Justice Brennan emphasized in his concurrence that he was mostly concerned with nonprofit religious organizations because "[t]he risk of chilling religious organizations is most likely to arise with respect to nonprofit activities." Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 344 (1987) (emphasis in original). The nonprofit status, Justice Brennan noted, "makes plausible a church's contention that an entity is not operated simply in order to generate revenues for the church, but that the activities themselves are infused with a religious purpose." Id. As the hearing record shows, there is no doubt that KFUO(AM) and KFUO-FM are operated by the Church as part of its religious mission. KFUO(AM) has been operated as a noncommercial religious station for seventy years, and KFUO-FM has been used to provide sacred music to the people of the St. Louis area since 1948. (Church Ex. 7, pp. 2-4; Church Ex. 4, pp. 2-3). KFUO-FM did so as a noncommercial station from 1949 to 1983, and even when KFUO-FM began to sell advertising in 1983, it did so as part of a nonprofit entity. (Church Ex. 7, pp. 5-6). In fact, throughout the entire License Term, KFUO-FM operated at a deficit, able to continue delivering its program service to the public only through continuing contributions from the Lutheran Church-Missouri Synod. (Church Ex. 4, Att. 5). There can be no doubt that the Church's operation of KFUO(AM) and KFUO-FM is "infused with a religious purpose" and is done for nonprofit purposes.

proceeding, the Church has been forced to defend its hiring practices with regard to each and every job opening, and has been repeatedly pressed "to predict which of its activities a secular court will consider religious." Id. at 336. In the latter portion of the License Term in particular, the Church was forced to modify its hiring practices, not to ensure gender and race equal employment opportunity, but to conform to the Commission's increasingly restrictive view of what constitutes an appropriate EEO program. Even more disturbing were the repeated queries by the Commission demanding to know, for every employment opening at the Stations for the last three years of the License Term, "whether the position required someone with 'theological training'." (M.M. Bur. Ex. 8, p. 2). Even more burdensome was the Commission's demand that the Church explain "the duties and responsibilities of the above positions, including those aspects of the jobs which require 'theological training'." (M.M. Bur. Ex. 13, p. 1). Demonstrating that improper entanglement has occurred is the language in the HDO stating that "[t]he licensee did not explain exactly what theological training was required for its announcing positions or how these two employees exhibited the requisite skills and training prior to employment," and that "the record does not reflect that the licensee ever satisfactorily explained what it intended by its requirements of 'Lutheran training' or 'classical music expertise' or that most

of its hires met even those requirements."[44/] HDO, 9 FCC Rcd at 920-21, 923.

142. While the Presiding Judge admirably attempted to avoid similar types of questions in the hearing, the very nature of the case as set forth in the HDO places the Commission on a collision course with the First Amendment. This proceeding has become, as Justice Brennan predicted, "[a] case-by-case analysis for all activities . . . [that] both produce[s] excessive government entanglement with religion and create[s] the danger of chilling religious activity." Amos, 483 U.S. at 344. This case also presents a situation in which a church is being prodded "to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well." Id. at 343.

143. While the First Amendment should indeed preclude the type of intrusive position by position questioning to which the Church has been subjected since the filing of its renewal applications, and to which the Church objects, it is equally important to stress that the Church is fully committed to the goals of equal opportunity, as is amply demonstrated in the record. The Church does maintain, however, that its judgments as

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44/ In point of fact, despite the impropriety of the Commission requesting information on the need for theological training, the Church extensively explained in prior submissions to the Commission that job criteria as well as the reasoning behind its desire for classical music knowledge in certain employment positions. (See Church Ex. 4, Att. 7, pp. 13-14 n.4; M.M. Bur. Ex. 14, pp. 5-19).